ONTARIO LAND COMPANY *v.* WILFONG.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 160. Argued January 24, 1912.—Decided February 26, 1912.

Where the bill attacks the constitutionality of the state law as applied by the state court, and the application of a case heretofore decided by this court runs to the merits, the motion to dismiss will be denied.

The refusal of the courts of the State to consider as essential to proceedings to foreclose tax liens certain ministerial duties, the omis-

In the description is the property in suit, assessed to unknown owners.

Foreclosure of the lien was prayed, and that judgment be given against each piece of property.

It also appears from the judgment roll that summons for publication was issued which recited that the county held certificate of delinquency; that the taxes were delinquent, time for appearance designated to defend the action or pay the amount due, and it was stated that in case of "failure so to do," judgment would be rendered foreclosing the lien. Judgment was subsequently entered and the property ordered to be sold. The judgment states as follows:

"This cause having this 2d day of September, 1902, been brought to be heard upon the application for judgment foreclosing tax lien filed herein, and the defendants and each of them having been duly served with notice as by law required, and no appearance having been made by said defendants, or either of them, and upon the proofs adduced, it appearing to the Court that the statements and allegations set forth in said application are true, the Court finds as follows:

"That the plaintiff herein is the owner and holder of Certificate of Delinquency issued on the 31st day of January, 1898, by the County of Yakima, State of Washington, the same being for taxes then due and delinquent, together with penalty interest and costs thereon, upon real property situate in said County, assessed to the defendants herein for the years and in the amount hereinafter stated. That more than five years have elapsed since the original date of delinquency of the taxes for the year 1895, which are included in said certificate of delinquency."

But it is objected that it does not appear that the certificate of delinquency was filed by the county treasurer with the clerk of the court, and that the omission is fatal to the validity of the proceedings.

To the contention the Court of Appeals answered that the filing of the certificate was directory, not mandatory, and, therefore, not jurisdictional, and to sustain this position cited *Washington Timber & Loan Co.* v. *Smith*, 34 Washington, 625. In that case the validity of foreclosure proceedings was attacked on the ground, among others, that the certificate of delinquency was not filed in the clerk's office before publication of summons, and it was hence argued that the court had not acquired jurisdiction of the property. The court, in the foreclosure proceedings, made a *nunc pro tunc* order declaring that the certificates were, in fact, filed before the first publication of summons and not at the time the file mark upon the certificate showed. The Supreme Court decided that the issue of the certificate was the essential thing and gave the court jurisdiction of the cause, and, having jurisdiction, and it appearing by the record that the certificates were filed in time, it followed that the point now raised related to a mere irregularity, which should have been raised in the foreclosure case. The court also ruled that the correction was one that could be made during the progress of the action, and that, therefore, the appellant in the case was estopped to raise the objection in the Appellate Court. The court finally observed: "The summons and its publication, we think, complied with the law. The property owner was, therefore, within the jurisdiction of the court, and was required to take notice of the action. The summons was by publication, it is true, but under § 3, pp. 385, 386, Laws of 1901, 'all persons owning or claiming to own, or having or claiming to have an interest therein, are hereby required to take notice of said proceedings, and of any and all steps thereunder.'"

The language of the court, it must be admitted, is not as precise in distinguishing the elements of its decision as one would like, but we think the ground of its ruling is that jurisdiction having been obtained by the issue

of the certificate and the publication of the summons, the omission to file the certificate in the clerk's office is a defect or irregularity to which objection must be made in the case. In other words, the filing is not jurisdictional, for the court expressed the view that the "delinquency thought to be fatal" (the omission to file the certificate) ". . . could in no manner affect the rights of the appellants" in the action. The conclusion is reasonable. It would yield too much to technicality to give to the omission to file the certificate the controlling effect contended for by appellant. We have seen that the certificate was exhibited to the court and constituted one of the grounds of judgment.

As remarked by Judge Gilbert, speaking for the Court of Appeals: "The revenue and taxation law of Washington is exceptionally lenient to the delinquent taxpayer, and offers him unusual protection in providing that his property may not be sold for delinquent taxes except upon foreclosure proceedings and after a long period of delinquency; three years in the case of foreclosure by an individual certificate holder . . . and five years in the case of foreclosure by the county." In both cases there is public notice given and proceedings in court, time and opportunity enough, we think, even to an accidental or negligent omission to pay taxes, and more than enough to the calculated and culpable delinquency charged against appellants in this case.

The courts of the State have refused to consider as essential to the proceedings in court to foreclose the lien for the taxes the omission of some merely ministerial duty of an officer which in no way could affect the rights of the property owner. *Miller* v. *Henderson, supra,* and *Smith* v. *Newell,* 32 Washington, 369.

In this connection we may observe that the proceedings in this case are the same as those passed on in *Ontario Land Co.* v. *Yordy,* 44 Washington, 239; 212 U. S. 152. It was

contended there, as here, that the proceedings were void because of the failure to file the certificate of delinquency. The Supreme Court of the State declined to consider the contention, holding that it was not open, as the land company had not tendered the delinquent taxes as required by the laws of the State. In this court it was not explicitly urged except in a petition for rehearing. The rehearing was not granted.

The other objections to the validity of the tax proceedings are presented in the briefs of appellant under two heads as to the judgment and one as to the deeds, as follows: (1) The judgment is void because of failure to file the application until the day of the entry of the judgment. (2) The judgment is void for want of jurisdiction because the summons did not inform the defendants in the proceedings "that any complaint was filed in court, or that it was filed at all." (3) The tax deeds are void because no notice of sale was posted or otherwise given.

These grounds of objection are untenable. The laws of Washington are as clear as they are simple in their requirements. They do not require a complaint to be filed before the publication of summons, but provide for an application for judgment after the publication of summons, and the court is explicitly directed to examine the application and to "hear and determine the matter without other pleading." There is a careful avoidance of complexity and expense. The property is proceeded against, and the procedure is made simple. The certificates of delinquency may be issued in one general certificate in book form and unknown owners may be proceeded against as such. And it is provided that all persons owning or claiming to have an interest in the property are "required to take notice of the said proceedings and of any and all steps thereunder." See *Williams* v. *Pittock*, 35 Washington, 271.

It is, however, contended that the Supreme Court of Washington has decided that § 4878 of Ballinger's Code is

applicable to tax proceedings and that it requires "that publication of summons shall not be had until after the filing of the complaint." And it is hence contended that the filing of the complaint before publication is jurisdictional.

The Supreme Court of the State has not decided as contended. It has decided exactly the other way. Indeed, it has held that if there were a total omission to file a complaint the judgment would not be void. *Snohomish Land Co.* v. *Blood*, 40 Washington, 626. *McManus* v. *Morgan*, 38 Washington, 528, 80 Pac. Rep. 786, and *Bartels* v. *Christensen*, 46 Washington, 478, 90 Pac. Rep. 658, are not apposite, being constructions of the statute before its amendment in 1901.

In this connection is urged the very technical objection that "the summons required answer 'within 60 days after the first publication' instead of 'within 60 days after the date of the first publication.'" To sustain this objection *Williams* v. *Pittock*, *supra*, is cited. It does not sustain the objection. It would be surprising if it did.

The objection to the validity of the deeds is also without merit. Under the laws of the State a tax deed is *prima facie* evidence, not only of the validity of the deed and order under which the sale was made, but also of the regularity of the prior proceedings. *Warren et ux.* v. *Oregon & W. R. R. Co.* (C. C. A. Ninth Circuit), 176 Fed. Rep. 336, and cases cited.

This brings us to the first proposition of appellant, that is, the insufficiency of the description of the land in the certificate of delinquency and in the summons, judgment and order of sale, and that therefore they were inadequate for notice and due process of law. This contention, however, was considered in *Ontario Land Company* v. *Yordy*, *supra*, and decided adversely to appellant.

As we have seen, the proceedings in that case were those involved in this. It was held that the company was

charged with notice of the platting and the condition shown by the plat of the Capitol Addition to North Yakima, that he had notice from the records of the listing and assessment for taxation of the blocks 352, 353, 372 and 373, and that they would occupy the place marked upon the official plat as "Reserved." The company also "had notice," it was said, "that the track marked 'Reserved' was not otherwise listed or assessed for taxation," and that the blocks "were used by the authorities for describing the 'Reserved' tract." The presumption of knowledge thus arising was fortified, it was said, by actual knowledge "that the authorities were attempting to assess and tax this 'Reserved' tract under the description of blocks 352, &c." Both were grounds of decision. In other words, the decision was not based alone on actual knowledge of what property was intended to be taxed, but upon the sufficiency of the description to identify the land in connection with the notice given to appellant by the record. And this was not *obiter*. *Union Pacific R. R. Co.* v. *Mason City R. R. Co.*, 222 U. S. 237.

A like presumption exists in the case at bar, and there is testimony of like actual knowledge.

Judgment affirmed.